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Decision

Matter of: The Panther Brands, LLC

File: B-409073

Date: January 17, 2014

Mary Elizabeth Bosco, Esq., and Elizabeth M. Gill, Esq., Patton Boggs LLP; and James R. Fisher, Esq., and Debra H. Miller, Esq., Miller & Fisher, LLC, for the protester.

Capt. Tyler Davidson, and Scott N. Flesch, Esq., Department of the Army; Lt. Col. Patrick Butler, National Guard Bureau, for the agency.

Paula J. Haurilesko, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. GAO will consider the protest of a subcontract award where the government's involvement in the procurement was so pervasive that the government in effect took over the procurement.
 2. Protest that the agency failed to recognize the protester's alleged exclusivity agreement with respect to performing one of the solicitation's requirements is denied where the record shows that the awardee proposed to satisfy this requirement in its proposal and the solicitation did not require evidence of an offeror's ability to meet the requirement.
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DECISION

Panther Brands, LLC, of Indianapolis, Indiana, protests the award of a contract to Rahal Letterman Lanigan Racing (RLL), of Brownsburg, Indiana, by Document and Packaging Brokers, Inc., d/b/a Docupak, for sponsorship of a racing team by the Army National Guard for the 2014 IndyCar racing season.

We deny the protest.

BACKGROUND

The Army National Guard has been advertising and marketing itself through sponsorship of an IndyCar driver and team since 2008. Contracting Officer's (CO)

Statement at 1. Under an ongoing indefinite-delivery/indefinite-quantity contract with Laughlin, Marinaccio, and Owens, Inc., d/b/a LM&O Advertising, the Army National Guard in August 2013 requested that LM&O provide a proposal for professional, administrative, and technical services, plus equipment and materials, to develop the Guard's IndyCar program to recruit new soldiers, retain current membership, and brand the Army National Guard throughout the IndyCar fan base during the 2014 season. The Army National Guard's request included a statement of work (SOW) prepared by the agency that described the services and deliverables sought. See Agency Report (AR), Tab 3, IndyCar 2014 SOW, at 3.

LM&O forwarded the SOW to its subcontractor, Docupak, which utilized the SOW to develop a solicitation on behalf of the Army National Guard to obtain an IndyCar driver and team to sponsor for a base year and four option years.¹ See AR, Tab 4, LM&O Transmittal Email and SOW. The solicitation informed offerors that contract award would be made on a best-value basis, considering pricing, added value marketing programs, and anticipated return on investment, but that "[t]he decision of the selected 2014-team remains with the Government Representative." AR, Tab 5, Solicitation, at 1. The solicitation required offerors to provide a variety of services and activities, including, driver appearances, special paint schemes, and, as relevant here, an activation footprint within the IndyCar "Fan Zone" exclusive to the Army National Guard.² Id. at 1-2.

Docupak sent the solicitation to six racing teams and received proposals from four teams, including RLL and Panther Brands, the incumbent. Docupak solicited additional information from the offerors after proposals were submitted. See AR, Tab 8, Docupak emails with Panther; Tab 9, Docupak emails with RLL.

Docupak prepared a proposal to LM&O that summarized the contents of the racing teams' sponsorship proposals. As relevant here, Docupak's submission to LM&O included a breakdown of costs proposed by each racing team and highlights of each team's proposal. See AR, Tab 10, Docupak's Proposal to LM&O, at 2-3, 19-21, attach. 3, Comparison Activity Highlights Table. Docupak did not, however, evaluate the merits of the racing teams' proposals nor provide any recommendation as to the selection of a racing team. LM&O prepared its own proposal to the Army National Guard based upon Docupak's submission, which included Docupak's

¹ While the solicitation did not explicitly state that it provided for the award of a fixed-price contract, it appeared to be soliciting fixed-price line items for the base year, and a mix of fixed prices and estimates for the option years. See AR, Tab 5, Solicitation, at 4-6. The parties do not contend that the solicitation provided for the award of a cost reimbursement contract.

² Also referred to as the "fan village," the Fan Zone is a physical space at IndyCar races where sponsors provide interactive displays and other activities for fans.

descriptions of the racing team proposals and a comparison activity highlights table. See AR, Tab 11, LM&O’s Proposal to the Army National Guard, at 4-5, 19-21, attach. 1, Comparison Activity Highlights Table. LM&O’s proposal also did not provide a comparative evaluation of the merits of the racing team proposals or any recommendation as to the selection of a racing team. In this regard, LM&O informed the Army National Guard that “Docupak will coordinate the sponsorship agreement with the team selected by the Government pending final approval of this selection by the Contracting Officer (KO) with technical input from the Contracting Officer Representative (COR).” Id. at 5.

The Army National Guard’s CO provided LM&O’s proposal to its evaluators with evaluation criteria and instructions.³ Supp. CO’s Statement at 2. The evaluators evaluated LM&O’s descriptions of the racing teams’ proposals under a technical factor, which contained three subfactors: qualifications of personnel, understanding the requirements, and soundness of approach. The evaluators identified strengths and weaknesses associated with each team’s proposal, and assigned adjectival ratings of outstanding, good, acceptable, marginal, or unacceptable, and a risk rating of low, moderate, or high. See, e.g., AR, Tab 17, Consensus Evaluation for Panther Brands; Tab 18, Consensus Evaluation for RLL. Panther Brands and RLL were rated as follows:

	Panther Brands	RLL
Qualifications of Personnel	Good	Good
Understanding the Requirements	Acceptable	Outstanding
Soundness of Approach	Good	Outstanding
Overall Technical (Risk)	Good (Low)	Outstanding (Low)
Price (base year)	\$17,219,658.47	\$12,693,967.47

AR, Tab 20, CO Memorandum; Tab 11, LM&O’s Proposal to the Army National Guard, at 19. Under the understanding the requirements subfactor, the evaluators determined that Panther Brands had three weaknesses.⁴ As relevant here, the

³ The Army National Guard evaluators did not receive or review the racing teams’ actual proposals; instead, the evaluators received the summary materials prepared by Docupak and LM&O. CO’s Supp. Statement at 2.

⁴ The evaluators decided that RLL had no weaknesses under this subfactor. AR, Tab 18, Consensus Evaluation for RLL, at 5.

evaluators concluded that Panther Brands had a weakness for failing to propose any branding or media opportunities outside the IndyCar or existing military programs to expand the Army National Guard reach or cultivate a more diverse target. AR, Tab 17, Consensus Evaluation for Panther Brand, at 5.

The evaluators' consensus evaluations were reviewed by the CO, who selected RLL to receive the sponsorship contract. AR, Tab 20, CO Memorandum, Sept. 27, 2013. The agency informed LM&O, which informed Docupak that the Guard had selected RLL for award. AR, Tab 13, LM&O email to Docupak, Sept. 27, 2013. Following notice of the selection of RLL's proposal for award, Panther Brands protested to our Office.

DISCUSSION

Panther Brands argues that the Army National Guard improperly evaluated proposals. More specifically, Panther Brands contends that it is the only offeror that is capable of providing the Army National Guard with space in the IndyCar Fan Zone owing to the protester's exclusivity agreement with IndyCar, and that the agency failed to recognize that agreement in evaluating RLL's proposal. Panther Brands also challenges the agency's price analysis on the basis that the Army National Guard did not consider the cost to other offerors of obtaining the rights from Panther Brands to access space in the Fan Zone. Panther Brands also alleges that a Procurement Integrity Act violation may have occurred. As discussed below, we have considered all of Panther Brands' arguments, although we discuss only the more significant ones, and find that none provide a basis upon which to sustain the protest.

Jurisdiction

As an initial matter, the Army argues that GAO does not have jurisdiction over the protest because the protest involves the selection of a second-tier subcontractor. The Army primarily relies on our decision in Yard USA, Inc., B-232326, Sept. 1, 1988, 88-2 CPD ¶ 207, in support of its position that we do not consider protests of the award of a second-tier subcontract. AR at 6-7. We do not agree that this case is applicable here.

Under the Competition in Contracting Act of 1984 (CICA), our Office has jurisdiction to resolve bid protests concerning the solicitations and contract awards that are issued "by a Federal agency." 31 U.S.C. § 3551(1)(A) (2006). In the context of subcontractor procurements, we initially interpreted CICA as authorizing our Office to review protests where, as a result of the government's involvement in the award process or the contractual relationship between the prime contractor and the government, the subcontract in effect is awarded on behalf of the government, that is, where the subcontract is awarded "by or for the government." See Ocean Enters., Ltd., B-221851, May 22, 1986, 86-1 CPD ¶ 479 at 2; recon. denied,

B-221851.2, June 26, 1986, 86-2 CPD ¶ 10. Pursuant to this interpretation, we traditionally reviewed subcontractor selections that were “for” the government, where the subcontract awards concerned (1) subcontracts awarded by prime contractors operating and managing certain Department of Energy, or other agency, facilities; (2) purchases of equipment for government-owned, contractor-operated plants; and (3) procurements by certain construction management prime contractors. Id.

However, the Court of Appeals for the Federal Circuit in U.S. West Commc’ns Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991) held that statutory language basically identical to that applicable to our Office did not provide the General Services Administration’s Board of Contract Appeals with jurisdiction over subcontract procurements conducted “for” a federal agency, in the absence of a showing that the prime contractor was a procurement agent, as defined by the Supreme Court in United States v. New Mexico, 455 U.S. 720 (1982) and the court of appeals in United States v. Johnson Controls, Inc., 713 F.2d 1541 (Fed. Cir. 1983). We subsequently concluded that our jurisdiction generally does not extend to awards made by others “for” the government, and that, accordingly, in the absence of a request by the federal agency concerned, we would not take jurisdiction over such procurements. Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103 at 3-4.

Our decision in Yard involved the award of a contract by a subcontractor for a steering control subsystem on the Navy’s AOE–6 Fast Combat Support Ship. We declined to review the award under our authority to review procurements “for” the government, because a subcontractor could not be considered a purchasing agent for the government. Yard USA, Inc., supra, at 2. As explained above, we have not taken jurisdiction over such procurements that are allegedly “for” the government since 1995. See Compugen, Ltd., supra.

We continue to take jurisdiction, however, where we find that a subcontract essentially was awarded “by” the government. See RGB Display Corp., B-284699, May 17, 2000, 2000 CPD ¶ 80 at 3. In this regard, we have considered a subcontract procurement to be “by” the government where the agency handled substantially all the substantive aspects of the procurement and, in effect, took over the procurement, leaving to the prime contractor only the procedural aspects of the procurement, i.e., issuing the subcontract solicitation and receiving proposals. Baron Servs., Inc., B-402109, Dec. 24, 2009, 2009 CPD ¶ 264 at 3; St. Mary’s Hosp. & Med. Ctr. of San Francisco, Cal., B-243061, June 24, 1991, 91-1 CPD ¶ 597 at 5-6.

Panther Brands argues, and we agree, that our decision in St. Mary’s Hosp. is applicable to the circumstances here. In that case, we agreed to consider the award of a second-tier subcontract where the government identified the need for the services, drafted the solicitation criteria, selected government officials to serve on

the evaluation committee, and approved the committee's recommendation for award. We concluded that the government controlled "every meaningful aspect of the procurement." St. Mary's Hosp., supra, at 6.

Here, the record shows that the Army National Guard controlled essentially every meaningful aspect of the procurement. The Army National Guard, using its own evaluation criteria, evaluated Docupak's summaries of the proposals, assigning adjectival ratings and identifying strengths and weaknesses. See AR, Tab 17, Consensus Evaluation for Panther Brands; Tab 18, Consensus Evaluation for RLL. Moreover, the Guard's CO selected RLL based upon the agency's own evaluation. Although Docupak summarized proposals and obtained additional information from offerors, the record shows no evidence that Docupak substantively evaluated proposals or recommended any offeror to the Army National Guard or LM&O, the prime contractor. Indeed, the solicitation itself informed offerors that the government would make the selection decision. See AR, Tab 5, Solicitation, at 1. Accordingly, under the circumstances present here, we conclude that we have jurisdiction here, because the Corps handled substantially all the substantive aspects of the procurement, such that the procurement was "by" the government.

Evaluation of Proposals

Panther Brands argues that the Army National Guard failed to fairly evaluate proposals in accordance with the solicitation, where the agency did not itself read the racing teams' proposals, but instead relied upon Docupak's summaries of the proposals. Panther Brands contends that, because the Army National Guard did not read its proposal, the Guard failed to recognize that only Panther Brands could meet the solicitation requirement to provide space in the IndyCar Fan Zone. In this regard, Panther Brands states that it has an agreement with IndyCar that provides Panther Brands with exclusive rights to use a space in the Fan Zone for the Army National Guard through the 2014 racing season. The protester argues that, given this allegedly exclusive arrangement, the agency unreasonably accepted RLL's promise to meet this requirement. Protest at 8.

Panther Brands has not demonstrated that the agency has violated any procurement laws or regulations or otherwise acted unreasonably by accepting RLL's proposal promise to satisfy the solicitation's requirements for space in the IndyCar Fan Zone. The record shows that RLL's proposal unequivocally committed to meeting the requirement to provide space within the IndyCar Fan Zone.⁵ AR,

⁵ Panther Brands also argues that the Army National Guard failed to recognize the impact of the protester's exclusivity agreement with IndyCar in the agency's analysis of the other offerors' prices. Panther Brands states that RLL's price for the Fan Zone is speculative and could not form a basis for cost comparison. Comments at 16. This protest ground has no merit. The protester's argument is

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Tab 7, RLL's Proposal, at 15. In this regard, the solicitation did not require offerors to provide evidence of its ability to meet this requirement. Moreover, IndyCar confirmed that it would be able to provide RLL with space within the Fan Zone for the 2014 racing season for the Army National Guard.⁶ See AR, Tab 15, IndyCar Letter to RLL, Nov. 11, 2013. Although Panther Brands believes that allowing RLL to provide space within the Fan Zone for the 2014 racing season constitutes a breach of its agreement with IndyCar, this matter is essentially a dispute between private parties which cannot be adjudicated by this Office.⁷ See e.g., Alden Films, B-233301, Nov. 1, 1988, 88-2 CPD ¶ 425 at 1 (breach of copyright laws); Morse Typewriter Co., Inc., B-212636, B-212636.2, Sept. 27, 1983, 83-2 CPD ¶ 383 at 1 (breach of distributorship contract).

Panther Brands also argues that, because the Army National Guard relied on Docupak's summaries to evaluate proposals, the Guard failed to credit the protester for its promised [Deleted], and erroneously assigned Panther Brands a weakness in the understanding the requirements subfactor for failing to propose any branding or media opportunities outside the IndyCar or existing military programs. Comments at 16.

We need not resolve this objection, because the record fails to demonstrate any reasonable possibility of prejudice, even if we accept Panther Brand's arguments in this regard. Competitive prejudice is an essential element of every viable protest. We will not sustain a protest, even if deficiencies, such as an unreasonable or

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rooted in its belief that no other offeror can obtain space in the Fan Zone for the Army National Guard because of Panther Brands' exclusivity agreement. This belief is belied by the record, which shows that RLL, as documented by a letter from IndyCar, can meet this requirement. See AR, Tab 15, IndyCar Letter to RLL, Nov. 11, 2013.

⁶ We recognize that the letter from IndyCar was dated after the filing of this protest, and was likely drafted in response to the protest. While we accord greater weight to an agency's contemporaneous record of its procurement action than to arguments and documentation prepared in response to protest contentions, we do not limit our review to contemporaneous evidence, but consider all the information provided, including the parties' arguments, explanations, and documentation prepared in response to protest contentions. J&J Maintenance, Inc., B-405310, Oct. 17, 2011, 2011 CPD ¶ 238 at 6 n.6.

⁷ We also note that whether a contractor performs in accordance with the requirements of a solicitation or resultant contract is a matter of contract administration that we do not review as part of our bid protest function. 4 C.F.R. § 21.5(a) (2013); Cornische Aviation & Maint., LTD, B-405013.4, Jan. 25, 2013, 2013 CPD ¶ 42 at 5.

unequal evaluation of proposals, are found, where the record does not demonstrate that the protester would have had a reasonable chance of receiving award but for the agency's actions. Leisure-Lift, Inc., B-291878.3, B-292448.2, Sept. 25, 2003, 2003 CPD ¶ 189 at 10; Metropolitan Interpreters & Translators, B-285394.2 et al., Dec. 1, 2000, 2001 CPD ¶ 97 at 9.

Although Panther Brands contends that it has been prejudiced by the agency's evaluation of a weakness for failing to propose any branding or media opportunities outside the IndyCar or existing military programs, the record does not show any reasonable possibility that this evaluated weakness affected the agency's selection decision, given that RLL's proposal would remain higher-rated and lower-priced.⁸ That is, even if we assume that Panther Brands' rating under the understanding the requirements subfactor would increase from acceptable to outstanding with respect to this one weakness--which appears unlikely given that the protester's proposal had two other evaluated weaknesses under this subfactor that the protester did not challenge--Panther Brands' proposal would only have a good overall technical rating as compared to RLL's overall outstanding rating. Also, Panther Brands' base year price of \$17,219,658.47 was significantly higher than RLL's base year price of \$12,693,967.47.⁹ See AR, Tab 11, LM&O's Proposal to the Army National Guard, at 19. Accordingly, we conclude that this asserted evaluation error presents no reasonable possibility of prejudice. See, e.g., Rolf Jensen & Assocs., Inc., B-289475.2, B-289475.3, July 1, 2002, 2002 CPD ¶ 110 at 8.

Procurement Integrity Act

Panther Brands also contends that an employee of the Army National Guard may have provided source selection information to the awardee, thus resulting in a potential violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 2101-07. Protest at 9. The Army advised our Office that it has initiated an investigation into the protester's allegation. AR at 19.

⁸ Although the agency in its legal arguments agrees with Panther Brands that the summary of Panther Brands' proposal did not mention Panther Brands' [Deleted], the record shows that the proposal summary did in fact include it. See AR, Tab 11, LM&O's Proposal to the Army National Guard, attach. 1, Comparison Activity Highlights Table, at 3.

⁹ Even if we deduct Panther Brands' [Deleted] from its base year price, the protester's base year price would still be higher than RLL's ([Deleted] vs. \$12,693,967.47).

Given the agency's ongoing investigation, we consider this aspect of Panther Brands' protest to be premature, and thus will not consider it. See Career Training Concepts, Inc.-Advisory Opinion, B-311429, B-311429.2, June 27, 2008, 2009 CPD ¶ 97 at 7.

The protest is denied.

Susan A. Poling
General Counsel